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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. 1258 OF 2003**

1. Rajesh @
   Chikana Rajesh Kisankumar Yadav
2. Vinod @ Vinu Sanjeeva Pujari ... Appellants
(Ori.Accd.Nos.1 & 2)

V/s

The State of Maharashtra ... Respondent

**ALONGWITH**

**CRIMINAL APPEAL NO. 1053 OF 2003**

1. Nagesh Nagraj Naikar
2. Mohamed Rafiq Abdul Aziz Shaikh ... Appellants
(Ori.Accd.Nos.4 & 7)

V/s

The State of Maharashtra ... Respondent

**AND**

**CRIMINAL APPEAL NO. 1369 OF 2003**

Irfan Hasan Bukhari ... Appellant
( Ori.Accd.No. 5 )

V/s

The State of Maharashtra ... Respondent

Mr. M.S. Mohite for the appellants in all appeals.

Mr. V.B.K. Deshmukh, A.P.P. for the respondent in all appeals.

**CORAM: V.G. PALSHIKAR &**
**SMT. NISHITA MHATRE, JJ.**

**DATED: 18TH DECEMBER, 2006.**

**ORAL JUDGMENT (PER SMT. NISHITA MHATRE, J.)**:

1. These three appeals are being disposed of together as they arise out of the same judgment and order of the Sessions Court, Greater Bombay, in Sessions Case No. 688 of 1999. Accused Nos. 1 and 2 have filed Criminal Appeal No. 1258 of 2003, accused Nos. 4 and 7 have filed Criminal Appeal No. 1053 of 2003 and accused No.5 has preferred Criminal Appeal No. 1369 of 2003. All the accused appellants have been convicted and sentenced under Section 302 read with 34 of the Indian Penal Code. Accused No.5, the appellant in Criminal Appeal No. 1369 of 2003 has also been convicted under Section 25(1)(a) read with 27 of the Arms Act, 1959 and was sentenced to suffer rigorous imprisonment for three years and payment of fine of Rs.1000/-. They have been acquitted of the charges under Sections 143 and 149 of the Indian Penal Code.

2. In brief the prosecution case is that the victim Rajivkumar Gupta was working in Rajesh Dying and Printing Works. On 22.2.1999, the victim and the accused were seen by the owner of a canteen, sitting on the platform outside a temple near the victim’s work place. The victim appeared to be frightened. He was

then seen sitting with the accused in the cabin of the watchman of Somani Estate, in which Rajesh Dying and Printing Works was situated. The canteen owner then noticed him at about 3.00 pm going towards the rear of Somani Estate. At about 4.15 pm on that day, the watchman reported to the owner of Rajesh Dying and Printing Works that one of his workers was lying in front of the common lavatory at the rear of Somani Estate. The factory owner promptly left to find out who the person was. He was followed by his manager and the owner of the canteen. They noticed the worker Rajiv Gupta lying there with blood oozing out from his mouth. His shirt was blood stained. The factory owner immediately reported the matter to the police who reached there shortly. A complaint was recorded. The inquest panchanama and the spot panchanamas were drawn up by the police during the course of the investigation. Statements of some of the witnesses were recorded by the police on the basis of which the accused Nos. 1, 2, 3 and 4 were arrested on 3.3.1999. Thereafter, on 3.7.1999, accused No.3, who died before the trial commenced, disclosed the name of accused No.7 as being involved in the crime. The accused No.7 was then questioned and he revealed the names of accused Nos. 5 and 6 as others who were involved in the crime. Accused No.7 led the police to the place where accused Nos. 5

and 6 were present. On a personal search being carried out, three live cartridges were seized from accused No.6. Accused No.6 who was also present, was found carrying one pistol of 0.30 calibre with 4 live cartridges. The flat in which they were found, was also searched and certain other articles including a mobile phone and one empty were recovered by the police. Accused Nos. 5, 6 and 7 were, therefore, arrested. The clothes seized were sent to the chemical analyzer for a report on the blood stains found on the clothes. Similarly, the pistols which were recovered and the live cartridges were sent to the ballistic expert for examination and a report. Sanction was obtained to prosecute accused No.6 under the Arms Act. The accused were all charged under Section 302 read with 34 of the Indian Penal Code. A charge was also framed under Section 25(1)(A) read with 27 of the Arms Act against assuced Nos.5 and 6. Accused No.3 died during the pendency of the trial on 4.11.2000 in an encounter with the police.

3. The accused have challenged their conviction and sentence under Section 302 of the Indian Penal Code as also conviction and sentence imposed on accused No.5 under the Arms Act.

4. With the assistance of the learned advocate for the appellant and the learned A.P.P., we have scrutinized the entire evidence on record. We find that the Sessions Court has not appreciated the evidence on record in its proper perspective. We are, therefore, constrained to set aside the conviction and sentence against the appellants under Section 302 read with 34 of the Indian Penal Code.

5. The prosecution has relied on the evidence of 6 witnesses to prove its allegations against the accused. The first witness examined is the medical officer who performed the post-mortem examination on the dead body of the victim. He has stated that the dead body had only one bullet injury. According to the doctor, the fire arm entry wound was on the left side of the chest wall, while the exit wound was on the right side of the back, about 15 cms. to the right of the spine. The doctor has been unable to state whether the fire arms seized from the accused could have caused the injury noted on the dead body.

6. The next witness examined for the prosecution is PW-2, the complainant. He is the person who was running Rajesh Dying and Printing Works at Somani Estate. He had employed the victim. He has spoken about his

watchman informing him about one person who was lying in front of the public lavatory on the rear side of the Somani Estate. He found that it was the victim Rajivkumar Gupta who was employed by him for loading and unloading work. He has spoken about his manager following him to the place where the dead body lay. The manager informed him that the workman had resigned four days prior to the incident. The victim was found lying on his chest. From the evidence of PW-1 and PW-2, it is clear that the victim met a homicidal death.

7. The third witness examined on behalf of the prosecution is the canteen owner who was running his business in Somani Estate. According to this witness, he knew the workers employed in Rajesh Dying and Printing Works as he used to supply tea to these workers. He has stated that, on 22.2.1999 at about 2.15 pm, he was on his way to repair his bicycle. He reached a temple in Somani Estate when he saw the victim sitting on the platform outside the temple. According to this witness, the victim appeared to be frightened. He saw 3 to 4 associates of the victim sitting with him. This witness proceeded to get his bicycle repaired and then returned at about 2.30 pm. At that point of time, the victim and his associates were sitting inside the cabin of the watchman of the Somani Estate. This witness

again left the canteen at about 3.00 pm in order to supply tea to his customers outside the compound of Somani Estate. He saw the victim and his associates going towards the rear of Somani Estate. This witness could identify only one of those associates of the victim, who he had seen as accused No.2. He could do so because accused No.2 had visited his canteen about 2 or 3 times earlier alongwith the victim as they were friends. This witness has also seen the dead body of the victim when he followed the employer of the victim towards the rear of Somani Estate. This witness states that the victim had introduced him to accused No.2, accused No.1 and accused No.3, who is now dead. However, after recording the examination-in-chief, this witness has been declared hostile. Therefore, the evidence of this witness is not of any use to the prosecution.

8. The panch witness who has been examined as PW-4 has spoken about the recovery of the fire arms. He was present when the police searched the house of accused No.5 and recovered two revolvers. He has stated that one revolver was found on the person of accused No.5, while the other was found on the person of another individual who was present in the house of accused No.5. Other articles were seized and recovered from the house

of accused No.5 besides the fire arms.

9. PW-5 is an employee of Somani & Co. This witness has also been declared hostile and, therefore, his testimony is of no avail to the prosecution.

10. The investigation officer has been examined as PW-6. He has arrested the accused and recorded the statements of the witnesses.

11. The case of the prosecution is based on circumstantial evidence. The first circumstance on which it relies is that the tea stall owner who is PW-3 has last seen the victim and the accused together. This tea stall owner has only spoken about the presence of accused Nos. 1 to 4 with the victim. He has mentioned the names of accused Nos. 5, 6 and 7. The last point of time at which this witness saw the accused together with the victim was at about 3.00 pm when he was going outside the compound of Somani Estate to one of his customer. He has seen about 3 to 4 associates of the victim alongwith the victim going towards the rear of Somani Estate. Out of these 3 to 4 associates, the witness was able to identify only accused No.2. However, this witness has been declared hostile and, therefore, not much credence can be placed on his

testimony.

12. The second circumstance on which the prosecution relies on to connect the accused with the crime is that, fire arms were recovered from the house of accused No.5. However, the recovery of the fire arms which is made at the instance of the accused No.5 is of no consequence as the prosecution has not examined the ballistic expert and proved his report. That being the position, it cannot be said with certainty that Accused No.5 had used the fire arms to kill the victim. According to the hostile witness PW-3, he has seen the victim with accused Nos. 1, 2, 3, 4 and 5. Accused No.1 was talking to somebody on a mobile phone, while accused No.5 was holding two pistols/revolvers. According to PW-3, who has been declared hostile the victim seemed to be frightened. However, merely because accused No.5 was seen carrying pistols/revolvers and the victim seemed to be afraid, it cannot necessarily lead to the inference that accused No.5 has killed the victim.

13. The prosecution has been unable to establish any motive on the part of the accused for killing the victim. It has not proved that there was a common intention between all the accused to kill the victim for one or the other reason. Therefore, the prosecution

under Section 302 read with 34 of the Indian Penal Code is unsustainable.

14. The recovery of the arms from the accused No.5 has been proved through the panch witness examined as PW-4. This witness has stated that two mouser revolvers were recovered; one revolver which was recovered from accused No.5 contained 4 cartridges in the magazine, while the other mouser revolver recovered from accused No.6 contained 3 cartridges. There is no evidence on record to indicate how many bullets could be carried in one magazine of the revolver. If it could carry only 4, then the fire arm recovered from the accused No.5 contained 4 cartridges. If it could contain 6 cartridges, 4 existed in the magazine of the fire arm, while one had been used allegedly to kill the victim. There is no explanation about the 6th cartridge.

15. Therefore, the chain of circumstances which the prosecution seeks to rely on, is not complete. The prosecution has only been able to prove that the victim was seen sitting with some of his associates when he appeared to be frightened. It has also been proved that the victim and the accused No.2 and some other associates of theirs had been seen proceeding to the rear of Somani Estate at about 3.00 pm and the victim

had been found lying dead an hour later. The prosecution has also been able to prove that accused No.5 was seen carrying pistols/revolvers on the fateful day when he was found with the victim. The prosecution has also proved the recovery of the fire arms from accused No.5. However, all these circumstances taken together, do not lead to the only hypothesis that it was the accused who had killed the victim. The person who had last seen the accused and the victim together is PW-3. He is the witness who has spoken about seeing accused Nos.1, 2, 3 and 4 together. After he was declared hostile, he has spoken about seeing accused No.5 with the pistols/revolvers. No credence can be given to such a witness and his testimony is liable to be disbelieved. In such circumstances, in our opinion, there is no evidence to prove that it was the accused who committed the crime.

16. Criminal Appeal Nos. 1258 of 2003 and 1053 of 2003 allowed.

17. The conviction and sentence passed by the lower Court is set aside. The accused to be set at liberty forthwith, if not otherwise required.

18. As regards Criminal Appeal No. 1369 of 2003, the

conviction and sentence under Section 302 of the Indian Penal Code is set aside. However, the conviction and sentence under the Arms Act is maintainable. The accused has already undergone the sentence and is liable to be released forthwith, if not required otherwise.

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